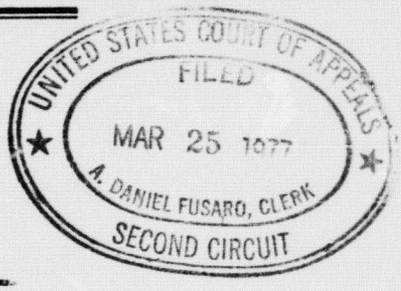
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

3/25

76-7565



United States Court of Appeals

FOR THE SECOND CIRCUIT

PITTSBURGH COKE & CHEMICAL COMPANY,

Plaintiff-Appellant,

—against—

LOUIS J. BOLLO,

Defendant-Appellee.

B

P/S

REPLY BRIEF OF PLAINTIFF-APPELLANT

CAHILL GORDON & REINDEL
Attorneys for Plaintiff-Appellant
Pittsburgh Coke & Chemical Company
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

OF COUNSEL:

PAUL W. WILLIAMS
FLOYD ABRAMS
JAMES J. FOSTER
RICHARD C. HSIA

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7565

- - - - - - - - - - - - - - - - - - - -

PITTSBURGH COKE & CHEMICAL COMPANY,

Plaintiff-Appellant,

-against-

LOUIS J. BOLLO,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - - - -

REPLY BRIEF OF PLAINTIFF-APPELLANT

The overriding errors of the trial court in its opinion denying judgment against Louis J. Bollo ("Bollo") are discussed at length in our main brief; we limit this brief to replying to several groups of contentions raised by Bollo in his answering brief.

1. The Relevance of Events Occurring Between Contract and Closing

Bollo violated rule 10b-5 by causing PCC to pay to him on September 18, 1969 millions of dollars for shares of Standard stock in a context in which, had Bollo disclosed material events that had previously occurred, PCC would not have gone through with the closing. The trial court, in discussing the federal securities law claims, refused to consider any events which occurred after December 20, 1968 because that was the day, according to the trial court, when PCC "committed" itself to the purchase (JA 860).

As we set forth in our main brief (pp. 22-26), the trial court erred for two reasons. First, PCC did not commit itself on December 20, 1968 to go through with the closing on September 18, 1969; any commitment arising from the December 20, 1968 contract to purchase the shares from Bollo expired pursuant to the terms of that contract on June 30, 1969 because the exemptions or approvals from the Civil Aeronautics Board and the Securities and Exchange Commission had not been received. On June 30, 1969, when the required exemption or approvals had not been received, PCC was free, by the terms of the December 20, 1968 contract, to walk away from the proposed purchase of Bollo's shares. That the closing on September 18, 1969 was not pursuant

to a commitment made on December 20, 1968 but rather to a commitment of a much later date after all of the undisclosed -- and undisputed -- events had occurred is a complete answer to the totality of the argument in Bollo's brief (pp. 38-44); it is noteworthy, not to say dispositive, to observe that Bollo's brief does not even address this point.

Bollo's entire argument is directed at our attack on the trial court's second error -- our submission (pp. 24-25) that, even if the December 20, 1968 "commitment" to purchase Bollo's shares had not expired on June 30, 1969, PCC would still have been relieved of the obligation to close the purchase due to Bollo's inability to satisfy certain express representations and warranties made in the December 20, 1968 contract. In this regard, Bollo argues (p. 42) that the application of rule 10b-5 should occur only "at the time when the decision to purchase or sell is made."* The fallacy in this position is that it ignores the fact that if a warranty which is to be met at the date of closing is not satisfied at that time, a

---

* In Goodman v. Poland, 395 F.Supp. 660, 689-91 (D.Md. 1975), the court cited Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir. 1972), and held that, in light of a "condition [which] was repeatedly emphasized" by the sellers, the purchasers were under a duty to disclose material facts until the time of "commitment", March 25, 1968, even though the purchase agreement had been signed ten days earlier on March 15, 1968 (395 F.Supp. at 691).

purchaser then has the right to decide whether to close the purchase. The purpose of the securities laws and public policy would plainly be frustrated unless full disclosure of material facts by Bollo to PCC were required at that point as well as at the point of the original decision.*

Of course, in the case where a party to a contract is irrevocably committed to a purchase of shares and where, by the express or implied terms of the contract, that party bears the risk of any post-contract material events, then rule 10b-5 does not provide an escape hatch from its commitment. Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir. 1972), relied upon by the trial court, is just such a case.

In Radiation Dynamics, however, what was at issue was the correctness of the trial court's instruction to the jury that the date at which materiality was to be determined was the date "when the parties committed themselves," and "not any later date, such as, for example, the formal closing date when the delivery and payment are formally completed and cleared" (464 F.2d at 890). Plaintiff in Radiation Dynamics had been irrevocably committed to the transactions well before

---

* Whether Bollo is also liable for breach of contract (Def. Br. pp. 43-44) has no bearing on the question of his liability under the federal securities laws. Contrary to Bollo's contention, PCC has not abandoned its claim for breach of warranty. As the claim for damages under rule 10b-5 is as broad or broader, however, the Court need not reach the warranty issue.

the closings,* and this Court therefore held the instructions proper. In this case, precisely the opposite was true; PCC was not irrevocably committed until after material and undisclosed events had occurred.

Materiality and Reliance

We discuss at length in our main brief (pp. 26-34) the legal issues relating to the materiality of the undisclosed adverse developments. We also there summarize those adverse developments in considerable detail and cite substantial uncontradicted testimony demonstrating the significance of those events (pp. 8-18). We will not repeat that exposition in this brief but simply refer the Court to our main brief and the testimony and other evidence cited therein for responses to most of Bollo's contentions.

A few points raised in Bollo's brief, however, do merit reply. In our main brief (pp. 27-29), for example, we note that an overriding error of the trial court in this area was that of testing disclosure in terms of the information provided to PCC, instead of the information which Bollo failed to

---

* Radiation Dynamics had agreed on June 24, 1964 to sell 500 shares to Goldmuntz subject to the condition that it obtain the shares from a third party. It obtained the shares on July 30, 1964 and thus became "committed" no later than that date, even though the closing did not take place until August 17. It had made firm offers to the other defendants which also became unconditional no later than July 30, when the shares were obtained, and the date of "commitment" was therefore no later than that date, even though the closings with those defendants were August 3 and 31. (464 F.2d at 881-82).

disclose. Bollo's response (p. 50) is that we were attempting to exclude from the determination of materiality the information actually disclosed. This, of course, completely misses the point, which not that disclosed information should not be considered but that information which was not disclosed must also be considered. In fact, as we argue in our main brief (p. 29), giving PCC detailed information about the company, including all the good news, and at the same time concealing the bad news, only magnified the significance of the nondisclosures.

We will not repeat here the lengthy sections of our main brief which demonstrate that the information that Bollo failed to disclose to PCC would satisfy any objective test of materiality. A few points raised in Bollo's brief, however, should be noted:

1. Bollo cites (pp. 24-25) that portion of the trial court's opinion (JA 845) which states that the effect of the Bendix Energy Controls ("EC") discount reduction on 1968-70 sales* was not shown. That conclusion was clearly erroneous -- and totally unsupported in the record -- in light of Jerry Bollo's testimony that the discount reduction affected 80-85% of the sales of Bendix EC products (JA 225). Indeed, an

---

* The trial court erred in including 1968 sales in its statement, as the discount reduction was not effective until January 1, 1969 (JA 1009).

exhibit was admitted in evidence showing that such a reduction, if it had been in effect during 1965-68, would have gutted Standard's profits during those years (JA 1011). The eventual effect on 1969-70 sales (though of no relevance to a case involving a failure to disclose occurring prior to September 18, 1969) can be easily calculated from the sales figures which were stipulated (JA 894). That calculation shows that, had the discount reduction not been effected, net pre-tax profits would have been greater by $110,000 in 1969 and $157,000 in 1970.*

2. In our main brief (pp. 36-37), we note the trial court had reached a totally insupportable and erroneous conclusion based upon, inter alia, erroneous factual assumptions including the assumption that PCC had been told of Pan Am's orders of $725,000 of Bendix Navigation and Control ("N&C") equipment. Bollo, in reply, disingenuously cites (p. 32) a reference to Pan Am's 747 business in a Johnston memorandum of September 27, 1968, without divulging that that reference was specifically to "brakes and wheels" (JA 983) which were handled, not by Bendix N&C, but by Bendix EC (JA 297).**

---

* These figures were calculated in the same way as those set forth in JA 1011. The explanation there sets forth relevant details.

** Bollo also notes (p. 32) that there was no reference to Bendix N&C 747 business in two September 1969 documents; yet he does not suggest why such a reference would be expected.

3. Bollo argues (pp. 53-54) that PCC was aware of the Bendix discount reductions because of a brief reference in McDowell's May 1969 memo. That reference, in context, however, reads as follows (JA 973):

> "First quarter earnings were off substantially from last year's $83,000 after taxes to $45,700 on slightly increased sales. According to Bollo, this is caused mainly by non-recurring problems and he expects to catch up during the year. Some of these problems are a continuation of start-off expense of new branches opened last year, and particularly of the connector assembly activity in Kansas City. However, he also mentioned that his costs are increasing faster than his suppliers are permitting his selling prices and discounts to rise."

There is a substantial difference between the passing reference in the above context to a slowness in the rise of discounts, and what, unbeknownst to PCC, actually happened, i.e., a deep slash in the discounts of two of Standard's major suppliers.

4. Bollo argues that, even if the concealed information was material using an objective test, a subjective test -- which he chooses to characterize as "reliance"* -- should be applied to the facts.

---

* Neither Titan Group, Inc. v. Faggen, 513 F.2d 234 (2d Cir.), cert. denied, 423 U.S. 840 (1975), nor REA Express, Inc. v. Interway Corp., 410 F.Supp.

We have no quarrel with the conclusion of this Court in its earlier decision in List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert. denied, 382 U.S. 811 (1965) ("The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact"), which is cited by Bollo (p. 48) as the proper test of "causation in fact." Nothing in the record, however, suggests that PCC would have disregarded the information in question, had it been disclosed by Bollo. Indeed, all of the evidence is to the contrary.

(Footnote continued from preceding page)

192 (S.D.N.Y.), rev'd on other grds, 538 F.2d 953 (2d Cir. 1976), cases cited by Bollo (pp. 45-47), held that "where both misrepresentations and material omissions are alleged, a plaintiff must show both materiality and reliance" even with respect to defendant's omissions. As the court in REA Express correctly observed, in Titan Group,

> "The Court of Appeals considered each such category [misrepresentations and omissions] separately. It affirmed the District Court's finding that there had been no reliance on the misrepresentations, and its conclusion that the omissions had not been material." (410 F.Supp. at 199)

And, in REA Express, the court specifically found that "there were no material omissions" involved (410 F.Supp. at 197), thereby making necessary proof of materiality and actual reliance with respect to the misrepresentations in question.

The trial court correctly found that PCC studied the basic financial data of Standard prior to signing the contract and, between the contract date and the closing date, conducted an extensive investigation into the business of Standard. Yet, as the PCC witnesses testified, and as corroborated by contemporaneous memoranda (JA 973-84, 1086-87) and, indeed, by the testimony of Bollo himself (JA 647), the extensive study and the investigation did not reveal the material events which Bollo knew about but failed to disclose to PCC. From those facts, the trial court, without articulating its reasoning, stated there was no "reliance" by PCC.* To

---

* The trial court may have concluded that PCC had "relied" on its own investigation or sophistication. That PCC relied in part on its own investigation hardly means that PCC did not also rely on Bollo to provide adequate disclosure. Nor was Bollo's duty to disclose discharged by giving PCC access to some of Standard's records and letting it piece together such material facts as it could. Metro-Goldwyn-Mayer, Inc. v. Ross, 509 F.2d 930 (2d Cir. 1975) is just such a case. Because the purchase contract there provided, as the contract here provides, that "all representations and warranties by the sellers would have the same force as though made on the closing" (509 F.2d at 932), the Court in MGM stated that "the agreement specifically provided that all representations were to survive any investigation made by or on behalf of the parties" (509 F.2d at 933). Particularly under such circumstances, the Court in MGM held that, access notwithstanding, the information which had been omitted should have been "affirmatively disclosed" (Id.).

hold that a sophisticated investor, however, could not recover because he failed to discover, despite extensive investigation, that he was being defrauded is to return to the very philosophy of caveat emptor which the federal securities acts were enacted to eliminate.*

There is, in short, nothing in the record which suggests that the same group of "sophisticated" businessmen who would conduct such an extensive investigation would have simply disregarded the material -- and wholly undisclosed -- events and communications relating to Standard's relationships with its three largest suppliers which so impaired Standard's profitability and future.**

---

* Although some circuits had earlier articulated a standard of due care for plaintiffs in cases where negligence was sufficient to establish rule 10b-5 liability, the Supreme Court's decision in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), may have done away with that standard. Sundstrand Corp. v. Sun Chemical Corp., CCH Fed.Sec.L.Rep. ¶ 95,887 (7th Cir. Feb. 23, 1977); Holdsworth v. Strong, 545 F.2d 687, 692-94 (10th Cir. 1976); Straub v. Vaisman & Co., 540 F.2d 591, 596-98 (3d Cir. 1976).

** The uncontradicted testimony and contemporaneous memoranda (JA 973-84, 1086-87) establish PCC's great interest in Standard's relationships with its suppliers. Bollo argues (p. 52) that PCC had an "almost total lack of interest in 1968-69" in the details of the written contracts with the suppliers because it did not ask to inspect them. But at the trial, Bollo himself testified that the cancellation provisions of all the contracts provided for notice of one month or less. As Bollo told Bonar, the legal relationships with the suppliers were unimportant (JA 200-01, 207-08, 214). Changes in discount rates, as may be seen from the exhibits (JA 1124-60), are not contained in the contracts but were in the undisclosed supplier correspondence.

3. Scienter

Bollo argues (pp. 55-57) that PCC failed to prove that he acted with scienter, i.e., the intent to deceive, manipulate or defraud, required by the recent decision of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).* As demonstrated in our main brief (pp. 34-39), however, the testimony at trial established that a number of material events and communications were not disclosed to PCC. Bollo admitted at trial that he was aware of each event and communication at, or shortly after, its occurrence or receipt (JA 616-17, 622-23, 632, 638-41). Bollo's own testimony (JA 532-742) regarding his pervasive knowledge of Standard's business and his experience in the industry leaves no doubt that he fully realized the significance of each event and communication and its detrimental impact on Standard's business.

Knowing of all the material events and communications and fully appreciating their materiality, Bollo therefore knew that, unless PCC managed to discover the facts for

---

* The Hochfelder case presented a situation where an accounting firm had been charged with violating rule 10b-5 by negligently failing to discover a fraud. The Supreme Court held that, in order to recover damages under Rule 10b-5, plaintiff must show an "intent to deceive, manipulate or defraud" and that negligence did not suffice.

itself, PCC would pay him a price far in excess of what would be paid by a reasonable investor who was informed about the material events that Bollo chose out of self-interest not to disclose.* It is surely enough to establish scienter that Bollo knew these facts, appreciated their importance and nonetheless did not disclose them. As Judge Friendly succinctly stated: "Silence, when there is a duty to speak, can itself be a fraud." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 865 (2d Cir. 1968) (concurring opinion), cert. denied, 394 U.S. 976 (1969). Bollo was under a duty imposed by Rule 10b-5 to disclose such material information to PCC and his failure to do so when he had actual knowledge of that information demonstrates the requisite scienter.**

A number of post-Hochfelder cases support the proposition that scienter is established if the defendant fails to disclose material information known to him and where he must have known the effects of his failure to disclose

---

* Of course, the market price of Standard in 1968-69 (JA 868) and the price which had been offered by Premier Industries (JA 837) were also well in excess of what would have been paid by an informed investor.

** There is nothing in the record to support a contention that Bollo's failure to disclose was accidental or born of forgetfulness, and Bollo makes no such argument. In fact, Bollo's statements to Bonar in the summer of 1969 that the Bendix and Whittaker relationships were positive (JA 200, 208-09) and Bollo's testimony generally confirming the accuracy of McDowell's memorandum of the May 9, 1969 meeting (JA 647) would refute any such argument.

would be to create a false and misleading picture. Sundstrand Corp. v. Sun Chemical Corp., CCH Fed.Sec.L.Rep. ¶ 95,887 (7th Cir. Feb. 23, 1977); Bailey v. Meister Brau, Inc., 535 F.2d 982, 993-94 (7th Cir. 1976); McLean v. Alexander, 420 F.Supp. 1057 (D.Del. Aug. 13, 1976); Adams v. Standard Knitting Mills, Inc., CCH Fed.Sec.L.Rep. ¶ 95,683 (E.D.Tenn. May 19, 1976); Cf., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d Cir. 1976). In several of these cases, defendants were accountants (Adams, Herzfeld, McLean) or an investment banker (Sundstrand), whose personal stakes in the nondisclosures were far more speculative or indirect than Bollo's stake here, where a full and frank disclosure was bound to cost him millions.*

---

* The factual basis for Bollo's contention fares no better than the legal basis. Bollo argues that he answered all questions asked and neither refused to turn over any requested documents nor instructed any other employee of Standard to hide anything from PCC. Bollo's summary of the evidence on these points contains several inaccuracies or exaggerations. For instance, he asserts (p. 56) that Jerry Bollo and Ernest Rushia testified "that Bollo's instructions to Standard's personnel when dealing with PCC representatives were to provide those representatives with information they requested and truthfully answer all of the questions." But Rushia did not testify that he received any such instructions, and Jerry Bollo testified, to the contrary (JA 344-45), that he was instructed to limit his discussions with PCC to certain topics and to clear any requests from PCC for documents with Louis Bollo (infra, p. 20).

4. Inventory

In our main brief (pp. 40-49), we set forth in detail the evidence demonstrating that the trial court erred in holding that Bollo did not breach his warranty that Standard's inventory had been properly valued. In his brief, Bollo merely quotes and restates the trial court's conclusions and makes no effort to defend those conclusions or to answer the arguments stated in our main brief, but instead concentrates only on the issue of damages. Several of his points merit brief response.

(1) Bollo criticizes the evidence that $381,000 in additional inventory should have been written off because that evidence, a special study of Standard's inventory by Price Waterhouse, was based on a statistical sample. The study, however, was composed of two parts: an item-by-item review of all inventory items with an extended value of $50 or more, and a statistical sampling of the items with extended value of less that $50 (JA 1273-74). The sampling techniques were spelled out in exhibits (JA 1020-23) given to the court and documents to Bollo's counsel at trial (JA 438-39), and Bollo's counsel was given an opportunity by the court to

consult with statisticians or other experts and, if he had any objection to the sampling procedure or its reliability, to call his own witnesses (JA 596-609). After conducting whatever review he felt appropriate, Bollo's counsel chose not to call any witnesses on the point and, in lieu of further testimony, agreed on a stipulation explaining the techniques (JA 1273-76).

(2) Bollo also asserts (without any citation to the record) that "a three-year rule was not wholly unacceptable to PCC's experts". This statement (p. 60), however, is precisely the opposite of what the witnesses actually testified. Price Waterhouse accountant David Christopher on cross-examination by Bollo's counsel testified as follows:

> "Q. What about a three-year rule instead of a two-year rule?
>
> "A. I know of no instance where I've ever seen a three-year rule used.
>
> * * *
>
> "Q. What about three years, does that sound like too long a period?
>
> "A. Again my answer is yes." (JA 420)

As for William Carolla, he testified that a two-year rule is "very liberal" and that the use of such a liberal rule, together with the failure to allow for devaluation of excess inventory, would make him want to look at the inventory more closely.* (JA 517)

(3) Finally, Bollo argues that the price PCC paid for Standard shares was based on its evaluation of Standard's earnings and therefore it would be inappropriate to measure damages by simply looking at the balance sheet. He argues (pp. 60-61) that the effect of additional inventory write-offs on Standard's profit and loss statement should have been considered. From that perspective, however, the damages are even greater than $381,000. Had a two-year rule been used consistently every year, the pre-tax earnings in 1965-68 would have been reduced $250,822 or 13.4% (JA 1018, 923, 944, 968, 1213). As the agreed upon price per share was a multiple of per share earnings during those years, then, if earnings had been 13.4% lower, the price should be decreased proportionately. The result would be a payment of $494,371 less for Bollo's shares and $152,886 less for the shares of the other shareholders.

---

* Bollo asserts (p. 37) that Mr. Carolla would not quarrel with a formula that was a reasonable exercise of business judgment. The question to and answer of Mr. Carolla, however, specified that the formula must be within the limits of no less than six months and no more than two years (JA 514).

5. Miscellaneous

Bollo argues (pp. 61-66) that the trial court's judgment of dismissal should be confirmed on the independent ground that PCC failed to prove damages. The trial court never reached and therefore never discussed the damages issue in its opinion. If this Court reverses on the question of liability, the proper course would be to remand to the trial court for an assessment of damages. It would be difficult on this record for this Court to reach a determination on that issue without the assistance of the trial court's analysis of the witnesses and evidence.

As far as Bollo's contention itself is concerned, it lacks any merit. PCC called as an expert on the question of damages William Carolla, who had been active in the aircraft parts distribution industry for over 20 years (JA 444-50), president of the largest company in the industry (JA 449), president of the Aviation Distributors and Manufacturers Association (JA 451) and had personally participated in the acquisition of several companies in the industry (JA 450-54). It would have been difficult, if not impossible, to find a more qualified or authoritative witness.* Carolla testified

---

* Bollo's only expert witness was an investment banker with absolutely no experience in this industry.

that the developments which had occurred prior to September 1969 made Standard's continued profitability so uncertain that the earnings history was not an accurate indication of future earnings, that valuation on the basis of a multiple of earnings was therefore inappropriate and that the company was worth no more than its net worth (JA 456-57, 465). The testimony of Carolla was unambiguous and fully supported by the evidence.

At several points in his brief, Bollo emphasizes that, whereas the closing took place in September 1969, (1) PCC paid Bollo $948,504 for his remaining shares of Standard in August 1970 "without alleging fraud, breach of warranty or anything else for that matter" (p. 13); and (2) Bollo was not charged with fraud or breach of warranty until this action was brought in March 1971 (p. 20). Although technically a decision on the issues on this appeal should not involve such considerations, we are not unmindful of Bollo's suggestion that this suit is somehow an afterthought. Although a complete answer to this question would require going beyond the record, several points can be made without doing so. First, Bollo continued as president of Standard until he was dismissed in October 1970 (JA 552). Aside from the fact that such a position gave him considerable control over information

received by PCC regarding affairs at Standard, Jerry Bollo testified that, during the period between the closing and his brother's dismissal, Louis Bollo instructed him and Mr. Rushia to limit their discussion at directors' and other meetings with PCC personnel to certain predesignated topics and directed them to clear any requests for documents from PCC through him (JA 344-45).* Second, the Price Waterhouse inventory analysis that uncovered the large quantities of deadstock was made in late 1970 (JA 1020-23). Any suggestion that there was an inordinate delay between the discovery of Bollo's misconduct and the date of bringing this lawsuit thus not only ignores the relevant statute of limitations; it is simply not warranted by this record.

---

* Jerry Bollo testified as follows:

> "Q. Did he ever speak to you at all about what you should or should not say in any communications with representatives of Pittsburgh Coke?
>
> "A. Yes.
>
> "Q. What did he say?
>
> "A. At our directors meetings and other meetings that were held in Pittsburgh, on several occasions he reviewed the subjects -- the agenda, subjects to be discussed, and we, that is, Mr. Rushia and myself, were directed to limit our discussions to those topics.
>
> "Q. Did he ever suggest to you that if they requested a document from you, you should withhold that document from them?
>
> "A. No, he didn't direct me to withhold it from them. He directed me to clear any such requests through him." (JA 344-45)

CONCLUSION

In dealing in this reply brief with various of the factual misstatements in Bollo's brief, we do not wish to suggest that the primary errors of the trial court's ruling were factual -- however clearly erroneous those errors may be. The core errors of the trial court are legal: a misapprehension of the scope and nature of the Radiation Dynamics decision and a consequent misapplication of that decision; a misreading of the law on materiality and reliance; and an unwillingness to give proper legal effect to a wide array of undisputed facts, including facts found by the trial court in PCC's favor.

For the reasons set forth in the main brief and in this reply brief, the decision of the trial court should be vacated and the case should be remanded to the trial court for an assessment of damages.

Respectfully submitted,

CAHILL GORDON & REINDEL
Attorneys for Plaintiff-Appellant
Pittsburgh Coke & Chemical Compan
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

Paul W. Williams
Floyd Abrams
James J. Foster
Richard C. Hsia

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

PITTSBURGH COKE & CHEMICAL COMPANY, :

Plaintiff, :

-against- :

LOUIS J. BOLLO, :

Defendant. :

- -x

AFFIDAVIT
OF
SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

NICHOLAS J. BABIAK, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 25th day of March, 1977, I served the annexed Reply Brief of Plaintiff-Appellant upon:

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

by causing two true and correct copies to be hand-delivered to the aforementioned offices of attorneys.

Nicholas J. Babiak
Nicholas J. Babiak

Sworn to before me this
25th day of March, 1977

Thomas M. Doyle, Jr.
Notary Public

THOMAS M. DOYLE, JR.
Notary Public, State of New York
No. 31-4504646
Qualified in New York County
Commission Expires March 30, 1978

GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525